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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ANGEL GARIBAY,

Defendant and Appellant.

2d Crim. No. B206088
(Super. Ct. No. 1225885)
(Santa Barbara County)

ORDER MODIFYING OPINION AND
DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed on February 19, 2009, be modified as follows:

1. On page 4, in the second paragraph, immediately following the third sentence beginning "In any event," and including the citation to *Weaver*, add the following:

We do not read the court's statement, "I do not find any circumstances in mitigation," to mean that it did not *consider* the circumstances identified in Garibay's sentencing memorandum, but rather that it either rejected Garibay's characterization of those circumstances as mitigating or found them insufficient to warrant a more lenient sentence. (See *People v. Thompson* (1982) 138 Cal.App.3d 123, 127 [statement "Court finds no mitigation" construed to mean "the court was merely rejecting the mitigating influences as being insignificant"]; compare *People v. Burney* (1981) 115 Cal.App.3d

497, 505 [presumption that the trial court considered all relevant factors rebutted by statement "[t]he Court finds no circumstances in mitigation," where record disclosed undisputed mitigating circumstances].)

2. On page 5, at the end of the first paragraph, immediately following the sentence beginning "He also acknowledges," including the citation to *Yim*, add the following:

Even if Garibay could establish that the court also relied on improper factors in making its determination, he fails to demonstrate a reasonable probability that the court would have chosen a lesser sentence had it known some of its reasons were improper. (*People v. Price* (1991) 1 Cal.4th 324, 492.)

There is no change in the judgment.

The petition for rehearing is denied.